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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAR 10 1992

Federal Communications Commission
Office of the Secretary

In re Application of)
)
THE FIDELIO GROUP, INC.)
)
For a Construction Permit for a)
new FM Station to operate on)
Channel 282B in New York, New York)

File No. BPH-910502MQ

TO: Roy J. Stewart, Chief
Mass Media Bureau

REPLY BY FIDELIO TO OPPOSITION
TO PETITION FOR LEAVE TO AMEND

1. The "Opposition To Petition For Leave to Amend" filed by GAF Broadcasting Company, Inc. (GAF) on February 20, 1992 is a continuing effort to thwart legitimate competition for the privilege to operate a radio station on Channel 282B in New York City, and is utterly without merit. The "Petition For Leave to Amend" filed by The Fidelio Group, Inc. (Fidelio) on January 17, 1992 should be granted.^{1/}

2. The amendment proposes an increase in the height of the antenna to be located on the Chrysler Building and a corresponding reduction in effective radiated power so as to maintain the proposed coverage as set forth in the application as initially filed. There is no attempt to increase coverage or

^{1/} There is pending before the Commission our motion for extension of time (to yesterday March 9, 1992) within which to file the instant reply. GAF has consented to that extension request. The one-day delay has been due to the unexpected travel out of the city by Mr. Cole, lead counsel in this matter, for an urgent business trip that could not be postponed, and the time required for the undersigned counsel to become sufficiently familiar with the matter to prepare this reply. See accompanying "Motion For Leave To File Pleading One-Day Late."

secure a comparative advantage vis-a-vis GAF's coverage. The genesis of the amendment has been Fidelio's recent discovery that the Chrysler Building wants the antenna located at the height set forth in the amendment in lieu of the height set forth in the application as initially filed.

3. GAF has attempted through verbose and repeated filings (the "Opposition" to which this reply relates, as well as GAF's petition to deny Fidelio's application and recent reply to Fidelio's opposition to that petition) to create an impression that the Fidelio proposal is subject to infirmities relative to short-spacing and city grade coverage. We have responded to those attempts in our opposition to GAF's petition to deny and will have more to say on the subject in light of new matters raised in GAF's recent reply in an appropriate pleading to be filed with the Commission shortly. We have shown (and will continue to show) that there is and has been no infirmity in Fidelio's proposal relative to short-spacing and city grade coverage.

4. The instant amendment does not rationally relate to -- or purport to cure -- any such alleged infirmity and GAF's citations, Opposition at 4-7, miss the mark since they all involve attempted curative amendments dealing with some category of disqualifying defect in the acceptability of an application: FM Application Processing, 58 RR2d 776, 784-785 (Commission 1985) (adopting the current form of the rule against untimely amendments to cure defects in the acceptability of an

application); Emmy Hahn Limited Partnership, 4 FCC Rcd 8336, 67 RR2d 263 (Commission 1989)(rejecting untimely amendment to propose a new site to cure a short spacing); Special Markets Media, Inc., 4 FCC Rcd 5753, 66 RR2d 1250 (Commission 1989)(rejecting untimely amendment to reduce a combination of antenna height and effective radiated power that exceeded the maximum permitted height and power); PrimeMedia Broadcasting, Inc., 3 FCC Rcd 4293, 65 RR2d 27 (Commission 1988)(rejecting untimely amendment to reduce alien ownership to level permitted under 47 U.S.C. §310).

5. The only matters raised by GAF as to which there is any reasonably arguable basis for Commission interest relate to environmental considerations, i.e., the aesthetic impact on the Chrysler Building and RF radiation affecting persons who work in or visit the building. We shall have more to say about these arguments in the further pleading to be filed shortly, referred to in ¶3 above. Suffice it here to state that -- while we do not believe the RF radiation showing in the application as initially filed was defective, or that the proposal as initially filed would violate the Commission's requirements, 47 C.F.R. §§1.1301-1319, or the National Environmental Policy Act, 42 U.S.C. §4321 -- the instant amendment places the antenna a further distance away from offices in the Chrysler Building and strengthens our initial presentation that there will be no environmental hazard to persons who work in or visit the building.

6. Amendments of applications that assist in resolving

environmental questions are encouraged by the Commission as a routine matter. Environmental Rules, 60 RR2d 13, 16 (§18) (Commission 1985). The Commission does not require that such amendments be filed as of the time for filing amendments as a matter of right or else only upon a good cause showing. Indeed, the Commission calls for and accepts such amendments routinely within 30 days after issuance of the hearing designation order.^{2/} This is so whether the initial application had no environmental showing whatever, e.g., Rawlins Broadcasting Corp., 5 FCC Rcd 5253 (Video Services Division 1990), or a deficient one, e.g., Annette B. Godwin, 6 FCC Rcd 899 (Audio Services Division 1991); Donn M. Parker, 5 FCC Rcd 5480 (Audio Services Division 1990), or whether the Commission raised the matter based on its own studies, e.g., Sam Widge Advertising Limited Partnership, 6 FCC Rcd 882 (Audio Services Division 1991); Charles J. Saltzman, 2 FCC Rcd 1766 (Audio Services Division 1987), or whether the matter was raised in a petition filed by another party, e.g., Randolph Victor Bell, 3 FCC Rcd 5365 (Audio Services Division 1988). Indeed, amendments are permitted long after designation for hearing, in response to "draft" or "final" Environmental Impact Statements prepared by the Mass Media Bureau following

^{2/} Our research has uncovered nearly 200 hearing designation orders issued during the past approximately five years in which curative amendments of all kinds have been invited within 30 days after issuance of a hearing order; we have not uncovered any hearing designation order or other Commission decision rejecting any such curative amendment for any reason including late filing, absence of good cause, infirmity in the presentation in the application as initially filed, or the like.

designation of an environmental impact issue, but prior to commencement of the trial under such an issue. 47 C.F.R. §1.1306; Richardson Broadcasting Group, 5 FCC Rcd 5285, 5288-5290 (Rev. Bd. 1990).

7. For the foregoing reasons, as well as those set forth in our opening petition for leave to amend, the Commission should accept this technical amendment to adjust the proposed height and power, which makes no substantive change in the proposal or

CERTIFICATE OF SERVICE

I, Tiffany P. Simone, hereby certify that on this 10th day of March, 1992, I caused copies of the foregoing "Reply by Fidelio to Opposition to Petition for Leave to Amend" to be sent, by first class United States mail, postage prepaid, to the following:

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